
HAWAII STATE BAR ASSOCIATION

COMMITTEE ON JUDICIAL ADMINISTRATION

REPORT OF THE

2019 BENCH-BAR CONFERENCE

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REPORT OF THE HSBA COMMITTEE ON JUDICIAL ADMINISTRATION

on the

2019 BENCH-BAR CONFERENCE

Friday, October 11, 2019

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ACKNOWLEDGMENTS

The Hawaii State Bar Association Committee on Judicial Administration was established for the purpose of maintaining a close relationship with the Judiciary on matters of mutual concern to the bench and bar. Over the years, the Bench-Bar Conferences, Criminal Law Forums, and Civil Law Forums have been productive because of the participation of Hawai'i Supreme Court Chief Justice Mark Recktenwald, of other members and staff of the Judiciary, and of the bar. The committee is appreciative of the commitment of Chief Justice Recktenwald and the Judiciary in making these efforts a priority.

I. INTRODUCTION

The Hawaii State Bar Association's ("HSBA") Committee on Judicial Administration¹ ("Committee") is composed of Hawai'i state judges and practicing attorneys in the fields of civil, criminal, and family practice. The Committee, among other duties and functions, has held Bench-Bar Conferences at the Hawai'i State Bar Conventions for a number of years.

The last Bench-Bar Conference took place on October 11, 2019. The meeting of judges and lawyers were separated into the following subgroups: Civil Circuit Court, Criminal Circuit Court, Civil District Court, Criminal District Court, and Family Court. Each group was given common topics to discuss that could impact the judicial system. The 2019 common topics were as follows:

¹ The Committee in 2019 was comprised of the following co-chairs and members: Hawaii Supreme Court Associate Justice Simeon R. Acoba, Jr. (ret.), co-chair; Steven J. T. Chow, co-chair; Hawaii Supreme Court Associate Justice Richard W. Pollack, Second Circuit Court Judge Joel E. August (ret.), Third Circuit Court Judge Ronald Ibarra (ret.), Third Circuit Court Judge Melvin H. Fujino, First Circuit Court Judge Rowena A. Somerville, Fifth Circuit Court Judge Randal G. B. Valenciano, Family Court District Judge Brian Costa, Hayley Y. C. Cheng, Dennis W. Chong Kee, Kahikino Noa Dettweiler-Pavia, Vladimir Devens, Kirsha Durante, William A. Harrison, Edward C. Kemper, Carol K. Muranaka, Kyleigh F. K. Nakasone, Lester D. Oshiro, Audrey Stanley, and Kevin K. Takata.

As described in the HSBA Board Policy Manual, the Committee:

Maintains a close relationship with the judiciary on matters of mutual concern to the bench and bar, monitors and formulates recommendations to the Board concerning legislation affecting the judiciary, studies and reports on subjects of judicial conduct and discipline, and coordinated activities of the HSBA relating to improvement of the judiciary and administration of justice.

1. Privacy. The focal point on this topic was the use or misuse of social media to investigate the private lives of any party or individual for the purpose of gaining an advantage in cases.
2. Scheduling, Continuances, and Extensions of Time. The discussion on this topic centered on requests for extensions and its impact on the court, attorneys, and the parties, and whether there were abuses of such requests.
3. Settlement and Plea Agreements. The focus on this issue was the concept of raising and exploring settlement (or plea agreements in the criminal area) as soon as possible.
4. Succession Planning. The Office of Disciplinary Counsel has had a surge of cases in which solo practitioners did not designate another attorney to wrap up their cases before death or inability to practice law occurred.

The question is whether designation of a successor should be required.

Prior to the Conference, each subgroup suggested specific topics relevant to their practice. For example, in the criminal arena, there were discussions about fast-tracking mental health cases. In the Civil Circuit Court and Civil District Court subgroups, various concerns with the recent implementation of the electronic filing system were discussed.

For the first time, Family Court judges and lawyers participated in a Family Law group at the 2019 Bench-Bar Conference. One of their topics centered on a recent Hawaii Supreme Court case that impacted settlement offers.

The subgroups attempted to arrive at a consensus on the various topics. A number of times, no agreement could be reached.

A. WELCOME

Justice Simeon R. Acoba (ret.) and Steven J. T. Chow, co-chairs of the JAC, welcomed the participants to the Conference on Friday, October 11, 2019 and thanked Chief Justice Mark E. Recktenwald for his support and commitment in attending the conferences and forums every year. Participants were encouraged to provide comments and candid feedback so that the Judiciary might consider their suggestions and ensure that the judicial system works well for all involved.

B. OPENING REMARKS

Chief Justice Recktenwald thanked the Committee, HSBA, Task Force on Civil Justice Improvements (“Task Force”), Chief Judge Craig H. Nakamura (ret.), Judge Gary W. B. Chang, and the Judiciary for their hard work and support of the Conference, which is the Judiciary’s best source of input and feedback. Chief Justice Recktenwald was also proud to announce that the opening of the Kona courthouse, Keahuolu, was on time and on budget. Keahuolu features a new Self-Help Center, in honor of Judge Ronald Ibarra (ret.).

II. REPORT OF THE CRIMINAL-CIRCUIT COURT GROUPS

A. COMMON TOPICS

1. Privacy

The Guidelines of Professional Courtesy and Civility for Hawai'i Lawyers ("Guidelines") provide that an attorney who manifests professional courtesy and civility:

- (a) Does not inquire into, nor attempt to use, nor threaten to use, facts about the private lives of any party or other individual for purpose of gaining an advantage in a case, and where sensitive matters are relevant to an issue, will pursue such inquiry as narrowly as reasonably possible.

The questions posed for the group were:

- Is anything found on the Internet fair game?
- Should lawyers communicate with clients using social media?
- Does a lawyer's duty of competence under Hawai'i Rules of Professional Conduct ("HRPC") Rule 1.1² include knowledge of social media and how the technology may be used to influence a case?

A majority of the attorneys in the groups have searched social media posts on witnesses, adversaries, and jurors. Most attorneys feel that search of a public account does not present an issue. The use of social media levels the playing field, especially in the Office of the Public Defender, State of Hawai'i because there are limited funds to hire investigators. Before the advent of social media, public defenders would hire investigators. An attorney's job is to find information; thus, it is fair to obtain social media profile information if such information is exposed to the public. If such a search complies with fairness and the rules of evidence, then the information is fair game.

The American Bar Association ("ABA") has already addressed the issue of juror research. The ABA has approved such searches if it is only to collect information on the

² HRPC Rule 1.1 provides, in relevant part, as follows:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

juror. It is not proper to contact a juror through social media, but “Googling” a juror is not classified as any type of misconduct.

However, the attorneys foresee a problem if an attorney: (1) creates a fictitious account or (2) approaches a friend of an individual to get access to the social media account of that individual. The question then arose of what the attorney’s responsibilities are when a person has a lawyer or if the person is a juvenile? What is ethical in the context of a search? Sometimes it is not necessarily the content that is useful, but subtleties of the persona and personality that can be helpful in preparation for cross examination and questioning and can be just as detrimental as the content of the social media account.

The consensus of the groups is that any public information discovered by an attorney on the internet can be used in a case without any reservations.

The next question was whether an attorney should communicate with a client through social media. There was a consensus that using social media for non-privileged, public information is acceptable, especially if there is no other reasonable alternative available -- for example, in the case where a client’s cellphone is turned off and the attorney wants the client to return the attorney’s call. It was also the consensus of the groups that confidential communications should not be sent using social media, as it may cause disciplinary issues concerning confidentiality.

The final question was whether it would be considered malpractice for an attorney to lack proficiency in the knowledge and use of social media in the representation of a client. In other words, does the lack of knowledge and use of technology jeopardize an attorney’s duty of competence under HRPC Rule 1.1?

The participants believe an attorney must be aware of what social media has to offer, be proficient enough to use the sites productively and avoid violating disciplinary rules. However, this means that the attorney should be conscious of the drawbacks of using social media as an investigative tool. For example, there are some sites, such as LinkedIn that tracks contacts. Therefore, use of such sites like LinkedIn, will create a record of contact with the site. On certain occasions, the question may then arise as to whether an unauthorized contact with a represented party has been made.

After discussion, the consensus of the groups was that an attorney should not be required by court rule to become a social media expert and that effective representation does not require the attorney to have a high level of competence and knowledge of social media.

The discussion in Circuit Court-Criminal Group 2 then turned to monitored prison phones, computer messages, and conversations. The primary purpose of law enforcement is to prevent prison misconduct, but questions arise such as whether defense counsel should have notice of the monitoring taking place and have access to such information; whether such information is discoverable; and whether there should be rules governing the recovery, storage, use, and discovery of such information. If the prosecutors have access to these materials they can use it in preparation for trial, i.e. it may reveal how an inmate feels about a witness, whether he/she is on edge, or reveal a factor that can assist the prosecutor in fine tuning or preparing for cross-examination. From the prosecutor's perspective, these materials are not in their custody and control and often are never reviewed by a prosecutor. Moreover, if the materials do not contain relevant evidence, it is never turned over to the defense. The group decided that this was a discovery issue, and the attorneys were straying from the issue of privacy. Therefore, this "discovery issue" might be a topic for future discussion.

2. Scheduling, Continuances, and Extensions of Time

The Guidelines state that a lawyer should understand and advise a client that civility and courtesy in scheduling meetings, hearings, and discovery are expected and when the legitimate interests of the client will not be adversely affected, reasonable requests for extensions of time should be agreed to. The questions for discussion were:

- Are reasonable efforts made to schedule meetings, hearings, and discovery by agreement whenever possible, considering the scheduling interests of opposing counsel, parties, witnesses, and the court?
- Are delay tactics being used in scheduling meetings, hearings, and discovery?
- Is harassment, delay, or the appearance of being tough the purpose of seeking continuances or extensions of time?
- If new counsel is substituted for prior counsel, are requests for extensions of time reasonably given?

The discussion started with a description of how scheduling is conducted in the First Circuit and the issues surrounding Hawai'i Rules of Penal Procedure ("HRPP") Rule 48. Trials in the First Circuit are typically set with the understanding that the initial trial date merely acts as a place holder. This presumption becomes frustrating for attorneys, as well as parties who need to schedule vacation time and appear for court only to have the matter reset. There is also public frustration when matters are continued repeatedly, ultimately being dismissed on speedy trial grounds. In other circuits, before trials are set, courts set further proceedings such as status conferences, pretrial conferences, and settlement conferences to allow opportunities for settlement for cases that are not realistically proceeding to trial. This leaves only those cases that are on trial track to be set with "firmer" trial dates. For example, in the Third Circuit, continuances are not allowed for plea negotiations. Status conferences, however, are freely granted. Continuances are granted only for good cause. In the Second Circuit, judges differ on how trial weeks are set. Some judges set pretrial and trial dates initially, while other judges set pretrial dates that are continually moved until a trial date is firmly scheduled.

This scheduling issue was also discussed during the session on expediting case disposition.

Circuit Court-Criminal Group 1 also stated that problems of lengthy continuances have arisen in Hawai'i's Opportunity Probation with Enforcement ("HOPE") Probation Court. Clients often remain in custody for significant periods while awaiting urinalysis tests.

The consensus was that in the First Circuit there are significant problems with case scheduling and continuances. However, there is a split among the group on how best to address such problems and whether taking another look at HRPP Rule 48 for possible amendments should be considered.

3. Settlement and Plea Agreement

The Guidelines state that a lawyer should raise and explore the issue of settlement in every case as soon as the case can be evaluated. The questions for discussion were:

- Are there attempts to de-escalate the controversy and bring the parties together?
- What are lawyers' considerations when arriving at a plea agreement?

In the First Circuit, plea deals appear to fall on the shoulders of defense attorneys. This is problematic because defense attorneys have no control over the process. Plea deals should be the product of mutual negotiations. The process is often confusing because different prosecutors can secure deals while others cannot. Defense attorneys are left wondering if a submitted deal can be approved. There is no insight for defense attorneys, and there seems to be no guidelines.

In the Third Circuit, pretrial conferences are informal, and judges sit with the parties to discuss the case. When appearing at a pretrial conference, the parties are required to have authority to make decisions. Prosecutors should have discretion, and they are expected to discuss the strengths and weaknesses of the case with the victims. To resolve a case, obtain a fair sentence or plea deal, the parties are expected to have all relevant information at the pretrial conference. Judges consider the ultimate goal is to resolve cases. Therefore, it is anticipated that each party should be willing to compromise.

Some attorneys want to see judges provide more sentencing “inclinations,” which would assist in obtaining more plea or settlement agreements. There was discussion about how meaningful “inclinations” could be. Some expressed the belief that judges are supposed to be independent. Therefore, to certify that a plea is the result of a knowing, voluntary, and intelligent waiver of rights, the court should not be a party to negotiations. This would eliminate the fear of a claim that the plea was the product of misinformation or worst, coercion. If judges are consistent in their sentencing practices, attorneys should expect similar results in like cases.

The group agreed there was no consensus on this topic.

4. Succession Planning

The annual registration form asks if the attorney has designated a successor for the attorney’s practice. Out of the 1,300 solo practitioners, only 139 attorneys have identified a designated successor to their law practices. When there is no designated successor or volunteer, the Office of Disciplinary Counsel (“ODC”) appoints and compensates an attorney to act as a trustee under Supreme Court Rule 2.20. The ODC

reports that it currently has approximately 45 open cases involving trusteeships. The questions for discussion were:

- Should attorneys be required to designate a successor?
- If there is a pending case before a judge, should the judge take any action?
- Should the successor's duties be different than the duties enumerated for a trustee appointed in accordance with Supreme Court Rule 2.20(c)?
- If no successor is designated, should the costs of the trustee be covered by a new bar assessment or by an increase in the bar assessment for ODC operations?

Recently, a number of attorneys have passed without designated successors and the ODC has spent hundreds of thousands of dollars hiring successor attorneys to review case files. If a successor attorney is designated, then the ODC does not need to be involved. Additionally, any expense in collecting, sorting, reviewing, and disposing of case files will be passed to the attorney's estate. According to the ODC, keeping records for six years is only required with respect to an attorney's financial records. It may not be necessary to maintain all other case files and records, especially since all criminal pleadings are kept as digital records in the Judiciary Electronic Filing and Service System ("JEFS") or Judiciary Information Management System ("JIMS").

There should be further discussion on making such a requirement mandatory. In the case of court-appointed attorneys, the courts must intervene for reassignment. Bar dues will continue to escalate if the problem persists.

The consensus is that attorneys should consider designating a successor.

B. SPECIFIC TOPICS

1. Expediting Case Dispositions: "Triage"

To obtain significant criminal justice reform, stakeholders will be required to reconsider the way cases are treated in our court system. All cases are not the same so procedures used to evaluate and dispose of them should not be of a "cookie-cutter" mode. Appropriate processes and disposition procedures depending on the nature of cases must be reappraised. The considerations for creating different tracks are:

- Type of offense
 - Crime against person

--Crime against property

--Drug offense

- Discovery
- Plea negotiations

There is a national movement to fast-track cases based upon the facts of the specific case to efficiently process cases through the system. Several defense attorneys mentioned ideas such as initiating calls to the prosecutors to openly discuss the possibility of negotiating a plea which defense counsel believed would be effective. It was also mentioned that there needs to be a tangible benefit in order for a plea bargain to work, such as an advantage for the defendant and the possibility of clearing the case from the prosecutor's caseload, especially if history shows that there is no enhanced or greater penalty if the matter were to proceed to trial.

The civil courts are undergoing a reform to expedite cases. Different tracks are being proposed to conserve judicial time and resources. The purpose of this discussion is to determine whether there would be similar benefits to having different tracks for criminal cases, with the hope of conserving resources by expediting the disposition of cases and release of defendants.

This track triage would not necessarily require handling by specialty courts. It would just focus on how different cases may be handled. An example is how COP/DAG cases are managed as opposed to repeat offender cases. There needs to be some way that the criminal justice system could be reformed to expedite cases. This would be beneficial in terms of establishing consistency from courtroom to courtroom. For instance, in the Fifth Circuit, there is a problem with inconsistent trial dates after arraignment. If cases with simpler issues can be identified and assigned to a faster track, then it would encourage everyone to resolve those cases.

Historically, the "bottom line" is that due to the workload for both the State and the defense, the parties are not going to work on matters until deadlines are nearing. The parties need to prioritize. Triage/tracks may help to move parties along.

There was a discussion about lowering the severity of certain crimes to petty misdemeanors so it would take the demand for jury trials out of the equation and hopefully

make the caseloads more manageable for all parties. The counterpoint on this issue is whether in doing so a defendant's constitutional rights are being violated for judicial expediency. Another query is whether pretrial diversions should be considered for first offenses. In the First Circuit, these types of dispositions are not allowed while the other state judicial circuits have used deferred prosecutions in certain cases.

There was further discussion in not using the descriptor "tracks." That term already has been used to delineate the differing paths in specialty courts. The group wanted to emphasize that there needs to be *flexibility* in taking the various cases and factors into *consideration* when contemplating how to resolve and dispose of cases. The group was open to coining another term which might better describe the procedural path of the differing cases.

There was a consensus in Circuit Court-Criminal Group 2 that there should be different tracks for different types of criminal cases and that consideration be given as to custody status, early acceptance of responsibility, witness, and immigration issues, and the like. There needs to be flexibility in considering the impact of these various factors in the scheduling of cases.

Circuit Court-Criminal Group 1 had several significant concerns with the concept of triage and tracks. Several judges and attorneys were opposed to the concept of different tracks. One argument against tracks: "Why should people be treated differently based on the nature of the crime? Look to the community perspective, and public policy. If you are a victim of a crime you should not be treated any differently based on the nature of the crime." Additionally, an attorney voiced concern that defendants will be complaining about "unequal justice" between defendants, i.e. "why is his justice shorter than mine."

In the Second Circuit, a "Pre-indictment calendar" was tried. This was an experiment for a short time, undertaking mass sentencing hearings, up to 15 at a time. The problem was that public defenders had difficulty contacting clients. It was suggested that a pre-indictment calendar be tried for drug cases.

There were many in this group opposed to establishing tracks because they believe that more hearings will ensue. They believe that setting cases earlier will lead to more motions to continue and extra hearings. Different tracks are not the remedy; the

judges exercising flexibility in setting differing trial dates is the better procedure. Murder cases should not be set in the same manner as other cases. The bigger issue is bail reform. If bail is truly reformed then it becomes less of an issue as to whether an Unauthorized Control of a Propelled Vehicle trial is set nine weeks out. Tracks are not necessary and would complicate matters. Another example is that habitual property crimes mostly involve homeless people. Homeless persons cannot afford bail, and hence remain incarcerated. The practical impact of the habitual property crime law is clearly not what the legislature intended.

There is the additional belief that attorneys should triage their own cases. Attorneys should know when to enter into plea agreements in particular cases early so that they can focus on their other cases. Judges should be able to rely on attorneys to do that. Fruitful discussions with the court help. Even if only one pretrial conference is scheduled, discussions are helpful because they allow attorneys to grasp what judges are thinking and compel the attorneys in the case to speak with each other face-to-face to resolve issues.

It is helpful when the pretrial conferences are not rigid. Expeditious resolution of civil cases may be specific to civil cases and not helpful in criminal cases. Uniformity helps everyone understand what the deadlines are. Different courts with different deadlines make the cases more difficult to manage.

The consensus in Circuit Court-Criminal Group 1 was that the triage model will not work, noting (1) the triage model based on the type of case is not feasible; (2) the client and client's record should determine priority; and (3) the courts can recognize the cases that may take longer preparation time and grant the necessary continuances.

In triaging cases, nationwide, jurisdictions segregate the more serious cases from the less serious ones and handling the cases differently. The intent is to maximize resources and save time to more efficiently handle the work of the courts. The group was not enthusiastic about specialized courts being the solution to dispose of heavy caseloads

The Hawai'i Correctional System Oversight Commission was created by the 2019 legislature to consider making the criminal justice system more rehabilitative than punitive. In that light, a combination of programs and support mechanisms is necessary

for such a rehabilitative system to work. Also, reclassifying certain criminal offenses as misdemeanors and lesser offenses may have an impact on expediting resolution of cases. The problem is a dynamic one and fixing one part of the perceived problem (expedited case processing) may be counterproductive to obtaining the legislative goal of creating a new rehabilitative system.

There was a robust discussion about downgrading and reclassifying certain offenses to aid in plea bargaining, while increasing the penalty for multiple offenders. For example, if a drug possession charge was reduced to a misdemeanor and a defendant is a three-time offender, then any subsequent offense would be charged as a felony.

Circuit Court-Criminal Group 1 suggested consideration of pre-indictment resolution of drug cases. These clients should be in treatment and receiving help. For a majority of these clients, treatment may be lengthy, and most of them only want to go to treatment when in custody. Once out of custody they no longer desire treatment. Thus, trying to motivate these clients with a “get out of jail card” for treatment does not always work.

In Circuit Court-Criminal Group 2, there was a lengthy discussion of the problems of expungement of records. Questions arose about the length of the waiting period for expungement orders, as well as removal of records in “no action” cases. Routine expungement procedures for those “no action” types of cases need to be addressed.

After an extended discussion, there was consensus in Circuit Court-Criminal Group 2 that the sentencing and penalty structures should be examined for possible reforms. There was also a consensus that reclassification of certain drug and class C felony offenses should be explored. There was a further consensus that a request be made to Chief Justice Recktenwald to establish a committee to make a presentation before the 2020 Criminal Law Forum about declassification of offenses, expungement issues, and treatment programs. It was also the consensus of this group to have a one-step process for expungement of all records, including arrest records, where no action was taken by the prosecutors, and all JEFS case information has been removed.

2. Fast-tracking Mental Health Cases

Mental health cases are often burdened with lengthy information-gathering problems, examiner report issues, and transition and contested case issues. Stakeholders in the process should consider reforming the case management procedures to expedite the process. The questions for discussion were:

- Is there a benefit to developing a system to “fast-track” mental health/Hawaii Revised Statutes, Chapter 704 cases (“704 cases”)?
- If so, what types of mental health/704 cases should qualify?
What type of criteria should be applied?
- Can the process be streamlined by:
 - Expediting the gathering of information for examiners?
 - Creating a process for attorneys to obtain information from facilities regarding the mental health of clients?
 - Expediting the transition of clients to hospitals?
 - Faster return of examiner’s reports?
 - Faster resolution of contested issues?

There is definitely a benefit to fast-tracking mental health cases. For example, if there are people on suicide watch at the Oahu Community Correctional Center (“OCCC”), that is not the best place for them to be. If a person is not well, prompt transfer to a hospital is necessary to keep them safe.

The concern in 704 cases is that there is a lack of doctors, and practicing doctors are overloaded with cases. Thus, there is a delay in receiving a timely mental examination. Frequently, a motion for a mental examination in capital cases, is readily granted by judges. Further, two examinations are required, one for fitness and one to determine mental capacity (responsibility) unless there is a stipulation limiting the examination. The time-consuming process of these motions adds to the delay in the system. Training for the doctors is “spotty” and typically there are no templates to enable doctors to produce uniform reports. Therefore, reports are inconsistent, some reports detailed and others terse.

There was also discussion regarding whether a change in the law should be considered to permit more clinical psychologists on three-member panels and to liberalize the use of one-member panels. Many ideas were proffered, but no feasible solutions.

The question was raised whether variations in the number of panelists should be based on different types of offenses rather than premised on whether the charge is a felony or a misdemeanor.

Circuit Court-Criminal Group 1 suggested that attorneys can call and advance three-panel hearings when all opinion letters are received from the panelists. Concern was voiced about the Third Circuit cases. There, the court contracts with outside examiners, and hearings are held on different days for different parts of the island. If the court believes a person may be a present danger to himself or others, the person will be hospitalized. If a person is in custody while awaiting examination, the client will be transferred to Honolulu where new examiners must be appointed. In that situation, the client's examination will be delayed, and thereby extending he/she time in custody. It was suggested that before moving for a 704 case examination, the parties determine whether the defendant is having mental issues or whether he/she is undergoing withdrawal symptoms from drugs.

Haw. Rev. Stat., Chap. 704 allows a judge discretion to transfer a defendant from custody to the hospital. In the First Circuit, if there is a request to place a defendant in the hospital pending examination, a motion is filed and a hearing is set. If there is a factual basis for examination and the Attorney General's office does not provide the court with census numbers and reasons for denial, then the court will usually grant the request. Courts often experience resistance to transfer from hospitals.

Also, in the First Circuit there has been a concerted effort to overhaul the Department of Health ("DOH") policies in this area. There are weekly meetings in preparation for a "Mental Health Summit." The DOH is actively recruiting more examiners and working to establish a certification process for the examiners.

There was a consensus that a way of fast-tracking "fitness" determinations in 704 cases must be developed. Often, judges order fitness and responsibility reports at the same time for what seems to be efficiency reasons; however, one cannot obtain a responsibility evaluation unless the fitness determination is made first. To determine criminal responsibility, doctors need to understand that assessment of the facts of the case requires more time. Accordingly, it would seem to be a more efficient use of

resources to fast-track or perform the fitness determination first. The discussion was still ongoing, however due to time constraints, Circuit Court-Criminal Group 2's session ended with the notion that the matter would need to be deferred to next year's Criminal Law Forum.

Circuit Court-Criminal Group 1 found the DOH and Judiciary are asking the same questions: How can we streamline and improve the process? Should some cases be assigned to a competency track? In some states, fitness is not a concern in misdemeanor cases. New York does not seek competency determinations. It clearly makes no sense to keep clients in OCCC for low level offenses when they will receive a short sentence. A system is needed where clients can be examined quickly to determine if they meet civil commitment criteria and, if not, to release them and secure services for them. A system that seeks to provide outpatient crisis care so clients are not sitting in OCCC or in a hospital is preferable. The First Circuit has a jail diversion program, but it is rarely used.

There is a need for a middle ground between civil commitment and a change of plea proceeding. In the First Circuit, jail diversion is an option only if it is voluntary, the defendant is found fit, and the prosecutor agrees. Diversion is only for misdemeanors. Idaho was the first state to look at these issues. Hawai'i is working on putting together a similar model. Hawai'i wants to establish new procedures involving lower level offenses. Hawai'i seeks to develop procedures where one can be deemed unfit yet be able to continue proceedings to receive treatment/crisis care.

In the Third Circuit, a 704 case client does not qualify for jail diversion. Defense attorneys are advised to consider whether a client may be better off seeking jail diversion. If so, attorneys communicate this to the prosecutors and the court. Thereafter, supervised release is sought to obtain treatment for the defendants.

Hawai'i needs to consider a two-prong model. If the client is fit, jail diversion is an option. A client needs an initial assessment with a court-based clinician and a hearing to establish his/her level. For the unfit, should the prosecutor weigh in for crisis care? In Miami, the parties accomplish crisis care by memorandum of agreement. New York has

a statute covering the matter and requires that a decision be made within seven to ten days.

There is also a need to determine if any other state has a similar program for felonies. Consideration must be given to whether there are any felony offenses that may be appropriate for such a program.

Additionally, consideration should be given to the diversion of certain clients, so they do not need to go through the 704 case process. Pretrial bail reports could flag fitness issues and possible jail diversion candidates. This would require 704 case/jail diversion criteria in pretrial bail reports and in clinician reviews. There are different stages of a case where a person with 704 case issues or jail diversion can be identified. However, not many are accepted into jail diversion because there is no guarantee of dismissal. Therefore, jail diversion numbers in the First Circuit District Court are extremely low. The District Court only accepts such cases from the courts and corrections divisions. However, the cases appear to have the same inherent problems. Accordingly, everyone must agree to a new system, unless there are statutory changes that provide judges the discretion to make those calls.

Families whose relatives have 704 case-related problems often turn to the criminal justice system for assistance. However, this approach does not appear to be successful. A viable alternative has been employed in Arizona through “crisis response centers.” Arizona has 14 such centers that accept individuals who would otherwise be placed in the criminal system. For example, rather than taking a person with mental issues to a hospital emergency room or into custody, the police in Arizona may take an individual to a crisis center for treatment that takes place outside of the criminal law system. This allows the police to promptly refer the case for treatment and the individual to avoid unnecessary involvement with the criminal law process.

This is the time to explore initiatives like that in Arizona here in Hawai‘i. Mental health issues are inextricably tied to the homeless crisis, and the Legislature could be open to such initiatives in formulating its strategies for resolving homelessness. Relatedly, a summit on mental health issues was scheduled for November 6, 2019, at the Hawai‘i Supreme Court.

A significant issue is ascertaining the relative cost of new programs in relation to resulting savings to the Judiciary, the public defender, and the prosecutors. Additionally, data would need to be gathered on the cost of present services. For instance, data might be collected in district court on the number of offenses typically committed in relation to savings resulting from shorter commitments for mental health evaluations and treatment.

The consensus was that there should be a type of diversion, so the clients do not have to submit to a 704 case process. Diversion makes it easier to fast-track a case because there is no reliance on or utilization of so many other entities.

3. Taking a Fresh Look at Drug Cases

Certain jurisdictions have recognized the collateral harm caused by felony drug convictions and the importance of targeting limited correctional resources more efficiently. Accordingly, those jurisdictions have sought wholesale changes in the way drug offenses are charged, prosecuted, and resolved. Questions discussed included the following:

- Should a closer look be taken at reclassification of certain types of drug offenses?
- Should felony to misdemeanor adjustments be made for certain types of possession offenses such as reclassifying as a felony after a third misdemeanor offense?
- Should drug possession offenses ineligible for jail time be subject to jail time after the third offense?
- Should expungement and/or record sealing be available for certain classes of drug offenses?

This discussion was partly touched upon in section 1 above by Circuit Court-Criminal Group 2. See discussion notes above.

Circuit Court-Criminal Group 1 added the following discussion:

There have been a number of studies, which show the harmful ramifications for persons with a felony record. Due to this, many jurisdictions have been changing how they deal with drug cases. For instance, in the Fifth Circuit, pleas are allowed on offenses from promoting dangerous drugs in the fourth degree to promoting harmful drugs in the fourth degree.

In a case with a measurable amount of residue or mitigating circumstances, the statute does not differentiate between the weight of the drug possessed. That is where the groups believe the discussion should start, positing that perhaps the same model as used in the habitual DUI case would work as a compromise for drug cases.

More funding may be needed for specialty courts and drug courts. If possession offenses are downgraded to misdemeanors, probation may not permit enough time to monitor and actually help the defendant. One solution may be more funding for the drug court program so that more people can be intensively supervised. There is a need to have increased monitoring and/or an available sanction. Some believe that the “misdemeanor fix” is only a “band-aid answer.” Sometimes averting legal consequences may not help in the long run.

A two-year probation model may also make sense. There is a judge in the First Circuit who is sentencing Promotion of Dangerous Drugs in the Third Degree to a two-year probationary term. Of major concern is a felony record. The first question that should be asked is “Should all drug cases be considered felonies?” The amount of the drug possessed should be seriously considered in determining the level of the offense.

The rules of admission to the drug court program should also be revamped. There is significant frustration with the drug court program in the First Circuit since the prosecutor’s office solely determines who is admitted into the program. Additionally, there are different tracks. Only track II allows clients to have their records expunged, and all of that depends on the prosecutor’s agreement. There is a definite desire to abolish that model.

Deferrals, Act 44, and other laws that aim to eliminate criminal records only work if clients complete the gauntlet set before them. There is a need to recognize that many drug addicts will violate conditions of probation (especially drug/alcohol prohibitions) but not commit other new crimes. These individuals do not need to go to Halawa prison and be branded with a felony on their record. Even though there are ways to keep offenses off of their record, reducing these charges to misdemeanors should be considered nonetheless. Some take issue with this suggestion because there is a belief that, if a

case is reduced to a misdemeanor, the deterrent effect of a possible felony record to assure compliance is lost.

Persons who pose high-risk and high use need to be identified because that is the population that requires the most resources. Some believe that with high-use and high-risk persons only the prosecutors are in the best position to be making these decisions.

There was discussion about success on regular probation versus drug court probation. Some believe that, if the defendants cannot succeed on probation, they will not succeed in the drug court program. Others believe they can succeed in drug court and have succeeded.

The majority of clients in the drug court program are high-risk and high need. The difference between persons whose drug problem causes crimes (high risk) and those who are unable to “kick” their drug problem (high need) must be considered. Attitudes are distinctly changing because now people in the suburbs are becoming addicted to opioids. Thus, it is not necessarily a criminal issue but instead a human issue. It clearly does not serve any purpose to keep drug abusers and addicts imprisoned. HOPE probation seeks to work with those individuals, but the model presently being used does not address this issue. There is a need to find out through early screening if the defendant is high risk or high need.

There are many clients who are sincere about wanting to keep their children and to stay out of jail; unfortunately, addiction overcomes them. California passed a law that allows for expungement for any drug offense following good behavior for a specific amount of time. Should Hawai'i also consider such a law?

The real question is: “Should individuals be sentenced to Halawa prison on a drug possession charge?” If individuals are committing other crimes, they will be adjudicated on those crimes. The reality is that people are imprisoned at Halawa for five years for a drug charge. Inevitably this is due to continual non-compliance on probation or in drug court.

Individuals need the opportunity to obtain treatment. If a defendant cannot commit to drug court, then he or she is sentenced to prison. But is it worthwhile to incarcerate them for 5 years? The law allows a minimum of one year up to five years imprisonment.

The way the parole board operates is that defendants will usually be fast-tracked and be able to timely parole out. If, however, the commitment is to Halawa with a history of failing the drug court program and/or probation, the defendant will be there for three to five years.

Courts in the Third Circuit will initially sentence defendants to one year of imprisonment, and if they fail with compliance, then the courts impose another year. This is done in an attempt to give the defendants “chances” instead of sending them immediately to prison. There is a belief that perhaps defendants are not being treated therapeutically.

In the Third Circuit, violations result in sentencing to Sand Island, Habilitat, and other residential programs. Opportunities for treatment are afforded but at some point, incarceration must be imposed.

Are the treatment programs not addressing the problem? Should efforts be abandoned, and should it be concluded that nothing can be done? There is a serious need to examine the types of programs being used and then to ask whether defendants are being set up for failure. There was no consensus on this issue.

III. REPORT OF THE DISTRICT COURT-CRIMINAL GROUP

A. COMMON TOPICS

1. Privacy

In response to whether “Is anything you find on the internet fair game,” the consensus of the District Court Criminal Group was if the information is public and does not concern a person’s private life, it is fair game. The information should be relevant to the case, including possible conflicts of interest. There were concerns that the use of deception to obtain information, such as using an alias to friend someone on Facebook, is inappropriate; however, it was noted that law enforcement may use deception in investigations. Using deception may violate HRPC Rule 4.1. If a page that was originally public is made private, the information contained on that page when it was public should be available for use.

Courts and attorneys may not know the foundational requirements for admitting social media evidence, which include authentication, establishing who an account belongs to, and hearsay.

2. Scheduling, Continuances, and Extensions of Time

Two concerns in the First Circuit were discussed: (1) ex parte motions to continue, and (2) continuances of trial. Regarding ex parte motions to continue, opposing parties are sometimes unaware of the motion before it is granted, resulting in defendants and witnesses needlessly appearing at court and the loss of opportunity to object. It was noted that many ex parte motions to continue are filed in operating a vehicle under the influence of an intoxicant cases (“OVUII”). Some courts do not grant ex parte motions to continue if it is within 48 hours of the proceeding. There were isolated incidents of deputy prosecutors requesting to exclude the period of the continuance under Rule 48, Hawaii Rules of Penal Procedure, due to the unavailability of a witness. Courts have struck such requests. The preferable approach is to have a hearing on a request to exclude the period of continuance from Rule 48 calculation. Deputy prosecutors have been encouraged to contact defense attorneys and consult on their requests to continue.

The second concern was that trials are begun and sometimes continued for too long such that witnesses may forget their testimony. Courts want to set continued trials as soon as possible but the calendar of private defense counsel sometimes prevents that. Per diem judges' calendars must also be accommodated in setting continued trials. This is a problem in the OVUII overflow court.

Suggestions to address these concerns include: (1) limit when ex parte motions to continue may be filed vis-à-vis the proceeding sought to be continued, allow opportunity to object before granting the motion, and prohibit requests to exclude the period of the continuance under Rule 48, and (2) limit the number of continued trials by not commencing trials that will need to be continued.

3. Settlement and Plea Agreements

The practice on neighbor islands is to negotiate early. There, deputy prosecutors sometimes include a plea offer with discovery. The different culture on Oahu may be due to the volume of cases, and defense attorneys want to know if the State will be ready for trial before negotiating a plea. Pre-trial conferences are conducted on the neighbor islands, which provide opportunities to discuss plea negotiations, but are not held on Oahu. From the courts' perspective, plea offers, and negotiations depend on the personalities of the deputy prosecutors and defense attorneys involved. Some judges participate in plea negotiations.

On Oahu, OVUII and driving without a license cases are usually not negotiated, the relationship of the parties and the defendant's record are a consideration in assault and harassment cases, and a supervisor's approval is not needed if a defendant pleads as charged, and in that circumstance, the sentence can be negotiated by the deputy prosecutor. The group recommends that prosecutors, public defenders, and the courts facilitate plea negotiations in advance of court appearances.

Problems with pleading in absentia were raised. Defendants that waive their physical presence and submit pleas via form may be unaware of the consequences of a conviction for offenses more serious than violations. There was a request that the judiciary clarify when FaceTime is required when a plea is entered in absentia.

4. Succession Planning

Private criminal defense counsel should consider designating a successor attorney. Suggestions include permitting retired inactive attorneys to function as successors and requesting the administrative courts to assist with transferring cases when a court-appointed attorney or privately retained attorney is unable or unavailable to represent a defendant.

The Judiciary needs to inform trial courts that when a notice of appeal is filed, the trial court is divested of jurisdiction, including hearing motions to withdraw as counsel.

B. SPECIFIC TOPICS

1. Expediting Case Dispositions: “Triage”

Private defense counsel should be allowed to make their appearance at arraignment through electronic filing (“efiling”). Concerns with this proposal include setting court dates that differ from the normal schedule, amendment of charges that occur in court, whether a bench warrant could be issued if a defendant fails to appear at trial, and the optics from the viewpoint of public defender clients who are present in court. In response to these concerns:

1. Dates for court proceedings could be set via efilings;
2. Bench warrants may still issue as defense counsel are obligated to inform their clients when they must appear in court; and
3. As for the optics, presently, private defense counsel are taken first on the court’s calendar and waive the presence of their client. If they were allowed to electronically file their appearance, neither counsel nor their clients would appear; as such, there would not be a problem with optics.

There are already different tracks for cases in district court, including traffic, weed and seed, and OVUII. Diverting cases from court and deferring prosecution for subsequent dismissal if a defendant abides by conditions were discussed as options rather than different tracks for cases. Diversion and deferred prosecution programs that were discussed included domestic violence intervention, law enforcement assisted diversion, crisis team intervention, Hawaii County’s restorative justice program, and teen court in the Fifth Circuit. The consensus was for the Judiciary, prosecutors, and defense

attorneys to further discuss diversion, deferred prosecution, and other ways to keep cases out of court.

The process to expunge cases should be made easier and references to expunged material should not be publicly available. Automatic expungement for some cases or offenses should be explored.

2. Fast-Tracking Mental Health Cases

Reports on a defendant's fitness to proceed are usually due within 30 days, however, extensions are routinely sought and granted. Defendants may be released after 30 days and fail to show up for their next appearance, resulting in the issuance of bench warrants. Expediting examinations should be investigated to reduce bench warrants and the time defendants spend in custody.

Defendants with mental health issues who are released from custody on supervised release may not contact the public defender's office and/or not appear for their next court date. A recommendation is to explore some form of intermediate placement other than either O.C.C.C. or supervised release.

A possible means to reduce the number of cases involving mental health issues is for law enforcement to divert suspects to services instead of prosecution. Fitness examinations could be expedited through a statutory change that permits students at the John A. Burns School of Medicine to perform those exams. Other solutions to reducing mental health cases and expediting examinations may be sought by looking at what other jurisdictions are doing.

IV. REPORT OF THE CIRCUIT COURT-CIVIL GROUPS

A. REMARKS BY JUDGE GARY CHANG RE: EFILING

Judge Chang explained that the criminal and appellate courts have been efilng documents for years and that all circuit court civil cases will begin efilng on October 28, 2019. All attorneys will need a JEFS identification number/account, and efilng will be mandatory. Attorneys must add themselves as a party to the case or they will not receive notices of electronic filings. Judge Chang encouraged everyone to familiarize themselves with the Hawaii Electronic Filing and Service Rules and Hawaii Court Records Rules, including Rule 9, regarding the filing of confidential/personal information.

Circuit court documents filed before October 28, 2019 will remain in paper form and will not be viewable online. Any new filings after October 28, 2019 should be available. Ecourt Kokua will replace Hoohiki.

JEFS will not be available Mondays through Saturdays from midnight to 4:00 a.m., or on Sundays from 12:00 a.m. to 12 p.m. Documents can be filed until 11:59 p.m., but it is not advisable to wait until the last minute. Attorneys are advised to check the Hawaii Rules of Civil Procedure and the Rules of Circuit Court to make sure they comply with all filing deadlines.

To obtain a hearing date in the Second, Third, and Fifth Circuit, attorneys must call the court and request a hearing date and time prior to filing their hearing motion. In the First Circuit, attorneys should email the court to request a hearing date and time, attaching the motion to the email. Attorneys and judges will be permitted to use electronic signatures.

If a document requires certification, certified copies are available online for a fee. However, if a document requires a stamp or embossment, this must be obtained in-person at the clerk's office.

More information, including the user manual, FAQ webpage, and training videos, is available on the judiciary website.

B. COMMON TOPICS

1. Trustees and Succession Planning

When a practitioner unexpectedly passes, he or she leaves behind cases that must be handled. If no successor has been appointed, the ODC is tasked with assigning a trustee. In 2019, ODC spent approximately \$100,000 on trustee cases and budgets \$150,000 for 2020. The mandatory fees of the Disciplinary Board are \$250. This is a big expense for all HSBA members. Additionally, when the Hawaii Supreme Court suspends an attorney's license, the Court requires that attorney to take certain steps to return to practice. If that attorney fails to take those steps, ODC must distribute and handle the attorney's cases, which is also funded by the bar.

The groups discussed options to address this issue, including mandating or requiring practitioners to designate a successor on the HSBA registration form, suspending a practitioner's license if he or she does not designate a successor, and/or creating a fund that practitioners without successors can contribute to.

Some thought attorneys should be required to designate a successor. One participant who was currently serving as a trustee explained that legal malpractice issues can arise if no successor is designated because it takes time for a trustee to become appointed and obtain the case files, which can result in missing deadlines or statutes of limitations. There is no rule or statute that tolls deadlines when a lawyer passes away and has no succession plan.

Some participants were concerned that a practitioner might designate a successor without obtaining consent, or that the designated successor's circumstances could change making him/her unable to serve as a successor. To avoid this problem, some participants suggested imposing a requirement that attorneys obtain an annual consent form from his/her designated successor. Others thought that mandating a successor and suspending licenses would unfairly penalize attorneys practicing in remote areas who may not be able to find a successor, despite his/her best efforts.

Another issue that arose is the enforceability of the successor designation. Who, if anyone, can enforce the successor to do the work?

Another point of discussion involved the duties of the trustee. As is, the rules only allow the trustee to (1) inventory the files and (2) contact clients. Should the trustees' duties be expanded? If so, will that lead to further malpractice claims if the trustee inadvertently misses important deadlines? One participant suggested that the HSBA and/or the ODC could explore obtaining insurance for these situations. One participant suggested approaching the Legislature about drafting a statute to toll deadlines for a certain period immediately following the death of an attorney with active cases. Another participant suggested that the ODC could hire an attorney who focuses solely on this type of work. It may be appropriate to increase bar fees to do so.

The consensus in one group was that a fee assessment should be imposed on all members of the bar so that everyone shares the burden and cost. There was also a consensus that solo practitioners on neighbor islands or in remote areas should not be suspended if he or she cannot find a successor.

The consensus in another group was that the HSBA and/or ODC should research what other jurisdictions are doing to deal with the same issue and consider adopting those models if they are proving to be successful.

2. Privacy and Access to Social Media

Should attorneys use social media to gain information about a case? Should attorneys be required to search social media to be considered competent? Are there ethical issues that arise when attorneys use social media as a tool to access information about parties, clients, or others involved in their cases? What type of advice should attorneys give their clients regarding their social media accounts? Does a spoliation claim arise when someone deletes information from his/her social media accounts?

There was a consensus that anything available in the public domain can be researched and used, but attorneys should not purposely gain access to privately posted media or "friend request" others to gain information that is not public to everyone. One participant commented that the federal rules now explicitly prevent attorneys from "friending" potential jurors.

There was also a consensus that deleting relevant information from the internet, without preserving a copy, does constitute spoliation of evidence. Attorneys should

preserve the information and disclose it when necessary, but do not necessarily need to advise clients to keep everything posted online ad infinitum for fear of a potential spoliation claim. However, it was also noted that there are some gray areas, for example, when a witness or opposing party has a private page but also has a shared friend in common. The friend shares or reposts information of the witness or opposing party, and opposing counsel happens to see it. A factual analysis is required to evaluate each circumstance to assess whether that information was obtained properly and/or whether a party should be allowed to use or refer to it.

There was also discussion whether attorneys should use social media to create an online presence that is favorable to their client, including posting pictures of a client on social media. Is it similar to a press conference? Should a judge be involved? Participants agreed that it depends on the circumstances of each case.

Additional discussion involved whether an attorney can be deemed competent, or to have committed malpractice, because of his/her failure to investigate social media. Is it simply a matter of the attorney's due diligence and responsibility? One participant thought that anyone who does not take advantage of the technology, including Instagram, Twitter, and Facebook, indeed exposes him/herself to a malpractice claim. Attorneys should know how to use basic technologies. Some participants expressed concerns regarding the scope of online investigations, including whether private investigators should be allowed to use software that is not available to the public. Others had questions about the admissibility of social media. Some participants noted that social media information, including pictures and written statements, can be obtained through traditional discovery methods, via interrogatory and production of documents requests, so the attorneys themselves do not have to be fully versed in social media technology.

It was noted that the American Bar Association Model Rule 1.1 regarding competence does not mention social media and only provides in the comments that "a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is

subject.” It does not define or create a standard with respect to competency and social media.

The consensus among the group was that there should not be a rule about competency and social media because technology is constantly evolving. Standards of care should not be created from the discussions held at this Conference.

3. Scheduling, Continuances and Extensions

There was a consensus in one group that the bar was not experiencing difficulties reaching agreements regarding scheduling or requests for continuances and extensions.

4. Settlement and Alternative Dispute Resolution

There was a consensus in one group that bar members were not experiencing any issues regarding settlement negotiations and/or alternative dispute resolution.

B. SPECIFIC TOPICS: CIVIL JUSTICE IMPROVEMENT

On June 19, 2018, Chief Justice Recktenwald created the Task Force on Civil Justice Improvements (“Task Force”). The Task Force was comprised of eight current and retired judges and nineteen lawyers. The goal of the Task Force was to look for ways to reduce costs and delays in civil litigation and to streamline the litigation process in Hawaii’s circuit courts. The Task Force formed four committees as follows: (1) case triage/tiering, (2) case management, (3) discovery, and (4) expedited trials and other innovations. The Final Report of the Task Force was submitted to the Chief Justice on July 24, 2019, and the Supreme Court set December 2, 2019, as the deadline for public comments on the recommendations contained in the Final Report.

The Task Force proposed a two-tier system, separating cases at the scheduling conference into one of two tiers based on the characteristics and complexity of each case, considering factors including the amount in controversy, number of parties, extent of necessary discovery, and readiness of the case for resolution. Straightforward cases would be designated into tier 1, and all other cases would be designated into tier 2. Cases in tier 1 would be fast-tracked with limited discovery and an early trial date set within approximately one year of the service of the complaint. While the parties’ agreement on a tier designation can be expected to carry significant weight, the judge will have the final

say. Parties may, based upon a showing of good cause, request that their case be re-assigned to the other tier. The Task Force proposed rules that require the parties to confer with each other and meet with the court significantly earlier than the rules currently require.

The Task Force proposed the adoption of the proportionality standard to require that discovery be proportional to the needs of the case. Adopting the proportionality standard will serve to reduce the cost of litigation by preventing excessive, disproportionate discovery costs.

The Task Force recommended setting a trial date within nine months of the early scheduling conference for tier 1 cases and within twelve to eighteen months for tier 2 cases.

1. Tiering System, Expedited Trials

Tier 1 was designed for straightforward and simple cases. Discovery would be limited, and trial would be set within one year after the service of the complaint. Continuances would only be granted in extraordinary circumstances. For tier 2, no additional discovery limitations beyond those contained in other discovery rules would be imposed, and continuances can be granted for good cause.

Some participants were concerned that the tiering system appears to limit the judges' discretion to handle cases, prioritizing early trial dates, rather than focusing on the overall resolution of cases. Perhaps the rules and tiers should be focused on resolution instead of scheduling trials.

Some participants disliked the tiering system and questioned whether it was necessary. These participants felt that the tiering system will result in more work for attorneys and judges, who inevitably will be forced to rush through discovery and prepare for trial with significantly less time to settle. If an expedited process is not necessary, then adding the tiering system will make everything more complicated, especially when tier 1 seems to be similar to the Court Annexed Arbitration Program ("CAAP"), which is already working well for smaller, simpler cases. Perhaps federal magistrate judges should be consulted for their view on the tiering system. Others expressed a similar concern that tier 1 and CAAP appear to be duplicative. Would CAAP be part of tier 1 or would it be a

separate tier? It was noted that the Task Force exempted CAAP cases from the tiering system and that the existing CAAP would continue to operate. The Task Force did recommend that the Judicial Arbitration Commission that is responsible for the CAAP evaluate the current condition of the CAAP and develop recommendations on how the program can be improved.

Others questioned whether the tiering system would burden or overwhelm the courts' calendars. Would the tiering system result in an increase in trials, and are the courts equipped and/or willing to handle an exponential increase in trials?

Members of the Task Force explained that the proposed rule changes were designed to increase efficiency and effectiveness in resolving cases. Shortened trial deadlines, along with early case management, were designed to increase early participation in resolving cases while also providing consistency among the circuit courts by outlining criteria on how cases are to be handled irrespective of who the assigned judge is. It was noted that many parties resolve their cases immediately prior to their trial date. Some settle during their trial. By setting an early trial date, the parties are forced to think of a resolution sooner, rather than spending time conducting excessive discovery.

Some participants noted that, due to limited resources, solo and small firm practitioners might have difficulty preparing for trial set within twelve months of the service of the complaint. It was also noted that plaintiffs' counsel may very well have their cases for as much as two years before defense counsel even know about the case and questioned whether the short deadlines were feasible. It was further noted that cases filed in federal court are different than the types of cases filed in circuit court and comparing these simpler cases to how the federal judges handle their cases may not be prudent.

Other participants felt that the tiering system would give clearer guidelines to courts while providing some flexibility too. Others said that the tiering system could help reduce the negative public perception that the judicial system is too slow and too expensive. Members of the Task Force also commented that Tier 1 would only be for certain types of cases, such as cases with lower potential damages or less complicated legal issues. The Task Force wanted to give parties an option to save money, cost, and time. Tier 1

would not apply to all cases that get filed, just the relatively straightforward cases that would benefit from limited discovery and an early trial date. Tier 1 would address the concerns of attorneys who are seeking an earlier trial date and are not able to obtain a trial date for two years or more.

One of the two groups was unable to reach a consensus on whether to adopt the tiering system. Ten participants opposed the tiering system, while twelve approved it. Additionally, if the rules were to be adopted, thirteen participants would like to keep the extraordinary circumstances standard for tier 1, while nine participants thought the good cause standard should be used in both tier 1 and tier 2. It was noted that the extraordinary circumstances standard could result in even more litigation costs preparing for trial, when the case could otherwise be resolved through settlement. Furthermore, some courts are busier than others, especially neighbor island courts that are also tasked with presiding over criminal trials. Adopting the extraordinary circumstances standard could impose an unanticipated burden on the courts' schedule, as well as the parties' and attorneys' schedules.

Although there were a number of concerns raised, the second group of participants reached a general consensus that the tiering system should be implemented to see if it would result in reducing the cost, expense, and time to disposition of cases.

2. Early Scheduling Conferences

While many participants had favorable opinions of the rule proposing early scheduling conferences, they were also concerned that the proposed deadline, as is, might be too short. If plaintiffs are required to file a notice requesting the scheduling conference within 14 days of serving the complaint, then the scheduling conference could be set before defendants have a chance to retain counsel. It was also noted that serving foreign companies can take up to six to nine months, and there should be flexibility in the rules for those situations.

It was also noted that if the scheduling conference is continuously extended, the purpose of having an early scheduling conference would be defeated, so there needs to be a balance.

Federal courts have staff who automatically set the scheduling conference, but because state courts have more limited resources, the Task Force proposed that the plaintiffs file a notice requesting the scheduling conference. Under the proposed rule, the judge can extend the scheduling conference date, and the parties can also request a continuance, but plaintiffs must submit the request and a date must be set by the court.

It was also noted that CAAP cases would be exempt from these requirements. Once a party appeals a CAAP decision, the case would be placed in either tier 1 or 2, and a scheduling conference would be set at that time. Administrative appeals, foreclosures, and certain other cases would also be exempt from the early scheduling conference process.

It was also noted that First Circuit court judges receive up to 22 new cases per month. It would be important for judges to have a simple form or template to increase efficiency and reduce potential errors. The neighbor island judges have dual civil and criminal calendars, and it may be challenging to find the time for all the scheduling conferences. However, one neighbor island judge said that getting involved early, setting dates, and going over the scope of discovery at the outset of the case would be helpful, so she would be willing to make the accommodations for early scheduling conferences. Members of the Task Force confirmed that they considered possible burdens on judges in developing the early scheduling conference proposal. Some participants felt that it would be illogical to have a scheduling conference when all parties are not present, and that the scheduling conference should only be set after all the parties are able to file an answer. Similarly, others felt that if a defendant files a motion to dismiss, the resolution of the motion could limit issues or even end the case entirely, so scheduling conferences should be set after the hearing on a motion to dismiss.

There was a consensus in both groups to adopt the rule requiring early scheduling conferences, provided that the judges and attorneys are allowed flexibility in continuing the early scheduling conference and/or trial dates when necessary. For example, flexibility may be appropriate when there are multiple defendants and only some of them have been served, or when motions to dismiss are filed in lieu of answers.

3. Discovery and the Proportionality Standard

Most participants felt that adopting the proportionality standard was a promising idea and that the amount of discovery allowed should be proportional to the needs of the case and the amount in controversy. This is a marked change from the current standard, but most likely a positive one that reduces cost and discovery disputes. One participant noted that the bench and bar should treat the change as a culture/mindset change in how we think about discovery. One group reached a unanimous consensus to adopt the standard.

4. Other Innovations, i.e., Experts' Reports, Initial Disclosures, Settlement Conferences, Pretrial Statements, and Letter Briefs

One of the proposed rule changes include the imposition of deadlines to exchange experts' reports. Experts' reports supporting affirmative claims would be due 120 days before trial. Experts' reports supporting defensive claims would be due 90 days before trial and rebuttal reports would be due 60 days before trial. The rule would also allow parties to agree to, and the court to establish, different deadlines pursuant to stipulation or court order. Most participants thought the proposed rule on expert report deadlines was a good idea, and the recommendation should be adopted.

Another recommendation included adopting a rule for initial disclosures, similar to the initial disclosure rule in federal court. Attorneys would be required to confer in the early stages of the case to disclose certain information and discuss a plan for discovery. If discovery disputes arise, both sides know about the dispute early in the case and the dispute can be brought up at the scheduling conference. Some participants thought that this process worked well in federal court. Others thought that it would fail to be effective if attorneys failed to meaningfully discuss the issues. A view expressed was that the rule should be strict and specific, or it should not be adopted at all. One member of the Task Force commented that writing the rule is only one part of its effectiveness and that the rule will only be as effective as we make it through our implementation and enforcement. The consensus, at least in one group, was that this rule should be implemented.

To enhance the effectiveness of settlement conferences, the Task Force proposed staggering the exchange of bona fide offers of settlement prior to settlement conferences,

with the plaintiffs' offer generally required to be made prior to the defendants' offer. This rule is aimed at ensuring that all parties are prepared at the settlement conference. It would also allow the defense more time to evaluate a demand and make a counteroffer. This rule also aims to provide uniformity among the judges and circuits. The consensus in one group was that plaintiffs' demand should be due 60 days prior to the settlement conference and defendants' response/counteroffer should be due 30 days prior to the settlement conference. One participant felt that the settlement conference should be set within 90 days of the scheduling conference. In federal court, the magistrate judge can limit discovery and set a settlement conference within 90 days of the scheduling conference, which helps some parties reach a resolution. Setting a settlement conference at the ninth, twelfth or eighteenth month does not help settle some cases because the parties have already incurred costs and attorneys' fees. However, another view is that each case is different, and the courts should have flexibility in deciding when to set the settlement conference because some cases require a certain amount of discovery and investigation before settlement is even possible. It was also noted that settlement conferences take time and judges should ideally set aside approximately five to six hours for settlement conferences. If an early settlement will be productive, the parties should inform the court at the scheduling conference. The consensus in both groups was that, whenever a settlement conference is set, offers should be exchanged far in advance of the settlement conference date.

One participant had concerns about the current rule that allows judges to sanction parties for failing to bring a person with full settlement authority to the settlement conference. Sometimes, the defense has evaluated a case and based on that evaluation, they believe that they have brought someone with sufficient authority. However, if the plaintiff or the judge has a higher evaluation of the case, they may feel that the defense has failed to bring someone with proper authority. In other words, the defendant gets penalized for not having someone there with an infinite amount of authority. On the other hand, some plaintiff attorneys have experienced instances where the defendant's insurance company brings an adjuster with an unreasonably low amount of settlement authority, far below any reasonable evaluation of the case. That is why sanctions are

necessary. It was noted that the Task Force did not modify the current provision on sanctions, which leaves the option for sanctions in the discretion of the court.

The Task Force proposed a rule which moves the deadline for filing pretrial statements much closer to the trial date but requires the parties to include more substantive information. The pretrial statement deadline would be seven days before any final pretrial conference scheduled by the court, or if no such conference has been set, fourteen days before trial. The rationale behind moving the deadline closer to trial is that parties will know more about their case, and accordingly, the pretrial statement will be more meaningful and substantive. Many participants felt that current pretrial and responsive pretrial statement requirements were not effective and favored this proposal.

Finally, the Task Force recommended that circuit courts adopt streamlined discovery processes for judges to settle discovery disputes through the quicker, less formal means of letter briefing. Some judges were concerned that this would be a burden on the courts and that parties would get upset if the courts could not address the letter briefs quickly. However, the Task Force made it clear that letter briefs should only be utilized when the courts permit it and that letter briefing was simply intended to be an additional tool for judges and parties to use, when it was appropriate. It was also noted that letter briefs would not be appropriate for all disputes, but that it could save time and litigation expense for some. Nearly all the judges and practitioners believed that letter briefs were a good idea, provided they were employed as an optional tool, rather than a requirement.

In summary, the groups' consensus was to adopt the proposals regarding experts' reports, initial disclosures, staggered exchanges of bona fide offers of settlement, pretrial statements, and the option for courts to utilize letter briefs for discovery disputes.

V. REPORT OF THE DISTRICT COURT-CIVIL GROUP

A. COMMON TOPICS

1. Privacy

Participants described the ways in which online information and communication are parts of our way of life now. For example, sometimes clients make initial contacts with lawyers through social media, or criminal lawyers are limited to communicating with their clients through social media messaging services. This type of communication does not seem problematic if no privileged information is being shared. Sometimes online research may reveal an article written by or about a party or witness, or it may reveal information that affects the party's or witness's credibility or position.

There is, however, good reason to be cautious about online information and communication. Judges must be careful when using social media. Participants agreed that recordkeeping is easier when information is communicated by email rather than by text message. The participants discussed a potential need for future regulation to ensure that online information and communication are not used as weapons. Until then, lawyers and parties should protect themselves by taking affirmative action to prevent online information or communication from being used against them.

2. Scheduling, Continuances, and Extensions of Time

Participants agreed that disagreements between lawyers regarding scheduling, continuances, and extensions of time are limited in District Court for two reasons: in many cases one party is represented, and the other party is pro se, and proceedings move quickly in District Court.

Judges' willingness to grant continuances depends on the issue. In summary possession matters, judges will be more lenient in granting continuances if the issue is collection rather than possession. When possession is at issue, judges are willing to grant a tenant's request for a continuance so long as a rent trust fund is also ordered. Rent trust funds are particularly important on the neighbor islands, where the timing of return days, pretrial conferences, and trials can result in tenants' remaining in possession

for up to three months after a landlord wishes to regain possession. The judges in attendance agreed that they will allow oral motions for rent trust funds and may raise the issue themselves.

3. Settlement and Alternative Dispute Resolution

Participants agreed that settlement and alternative dispute resolution are more regularly explored in District Court than in Circuit Court. In District Court, mediators will assist the parties in resolving residential and commercial landlord-tenant cases. On the neighbor islands and in the First Circuit District Courts other than Honolulu and Ewa, mediators will also assist the parties in resolving small claims matters. In the Second Circuit, many District Court cases are resolved through mediation, which is encouraged but no longer required.

In addition to encouraging voluntary mediation, all District Courts judges may order mediation and/or settlement conferences when appropriate.

4. Succession Planning

Participants discussed the problems that arise when attorneys pass away or become incapacitated without identifying a successor to inventory and return client files. The ODC currently rents commercial space to store such files. To address the problems, ODC has proposed either encouraging attorneys to identify successors, or requiring the identification of a successor as a condition of attorneys' licenses.

Participants agreed that it would be good to provide training to attorneys, particularly solo practitioners. For example, having solo practitioners fill out a form with their passwords would make it easier for successors or trustees to handle their files. It would also be useful to provide more guidance on withdrawing funds from client trust accounts and retaining client files for appropriate time periods. Participants discussed whether malpractice insurance companies or estate planning attorneys could assist attorneys in keeping records of their passwords and making plans for contingencies.

B. SPECIFIC TOPICS

1. Small Claims Calendar/Hearing Dates Under Rule 3

Participants discussed a potential rule change to Small Claims Rule 3(b) that would allow the Court to set the hearing date more than 30 days after the date of filing. This flexibility would be helpful if, for example, service was not made immediately, or trial was unnecessary.

On Maui, hearing dates are set close to the current maximum of 30 days after filing. The Court's view is that setting the hearing date based on the date of filing (rather than the date of service) creates additional work for the plaintiff and Court staff when service has not been promptly made. The proposed rule change would address some of the inconvenience.

2. District Court Jurisdictional Limit

Participants discussed a previous increase of the District Court jurisdictional limit from \$20,000 to \$40,000 and asked whether further increase was desirable.

Participants considered whether the Circuit Court was addressing some of the difference between Circuit Court and District Court by allowing expedited proceedings in cases with lower amounts in controversy.

The consensus among participants was that it would be beneficial to raise the jurisdictional limit from \$40,000 to \$100,000.

3. Rent Trust Funds

Participants discussed issues with inconsistency and inequity in ordering rent trust funds in landlord-tenant cases. In the Second Circuit, for example, data shows that rent trust funds may be ordered for the entire rent amount demanded in the complaint rather than for the rent amount that will become due. In addition, rent trust funds may be ordered for the full amount of rent demanded even if the tenant is paying only a portion of the rent and the remainder is being subsidized and paid.

Participants agreed that this appeared to be a training issue for the bench and bar. The prevailing views appeared to be that rent trust funds should be ordered only for rent as it becomes due and only if there will be a significant delay in resolving the issue of possession. The bench and bar also should be aware that rent trust issues are different

if rent is subsidized because the U.S. Department of Housing and Urban Development will continue to pay the subsidy directly to the landlord during summary possession proceedings.

4. Use of Verified Complaints

Participants discussed improvements by the bench and bar in requiring and providing the evidence necessary to support demands for relief. Attorneys are no longer signing declarations to support the amount demanded in debt collection cases, and the bench has been more uniformly requiring declarations showing that the declarant has personal knowledge and that documentation supports the amount demanded.

Participants discussed the benefits of providing properly supported complaints. The process of getting to judgment is important. Defendants may agree that they owe the amount demanded if they receive a properly supported complaint, and the Court will demand proper support in any event.

5. Filings of Returns of Service

Participants discussed changes for efile returns of service. Sheriffs will be allowed to efile returns of service if they are JEFS users connected to the case. Otherwise, attorneys will be required to file the returns of service.

6. Credit Card Filing Fees

Participants discussed the additional charge incurred when the filing fee for a complaint is paid online by credit card. This charge can be avoided by paying the filing fee by check submitted to the clerk's office. Alternatively, the additional charge likely can be added to any costs that may be awarded to the prevailing party.

7. Additional Concerns Related to the Implementation of Electronic Filing

Proposed orders: Participants were informed that they should file a cover sheet attached to the proposed order. Once the order is signed, the cover sheet will be removed, and the signed order will be electronically filed.

Paper copies: Participants were informed that there was no need to submit paper copies of motions or exhibits unless the paper copies were specifically requested by the judge.

Hearing dates: Participants were informed that they may call the District Court clerks for a hearing date.

Attorneys' fees: Participants discussed the possibility of increasing the amount of attorneys' fees that may be claimed without documentation from \$500 to \$750. Any increase would require judicial approval.

8. District Court Adoption of Any Proposed Changes to Procedures in Circuit Court

Participants agreed that many of the proposed changes to Circuit Court procedures were unnecessary in District Court because District Court proceedings move quickly.

VI. REPORT OF THE FAMILY COURT GROUP

A. COMMON TOPICS

1. Privacy

What information about a person's private life is "fair game" for use in a case?
What duties does an attorney have regarding the use of social media and technology?

This topic was the subject of lively discussion as the use of social media in Family Court can produce additional trauma and drama to an already highly emotional event in one's life.

The issues discussed were: 1) private versus public accounts; 2) the attorney's duty to be familiar with new technology and websites; 3) the attorney's duty to limit/censor access to explicit postings; and 4) the attorney's duty to monitor a client's social media use or view the other party's accounts.

The participants discussed whether the particular information, e.g., picture, recording, statement, was relevant or was being presented to embarrass the other party, and if it was relevant, whether such information should be granted equal weight as the other evidence provided.

The consensus was there is no expectation of privacy when it comes to the use of social media. Therefore, attorneys should familiarize themselves with social media applications, sites, and its use, and should be mindful of only using what is relevant and consider keeping the subject matter confidential, if appropriate.

There was also discussion regarding the appropriateness of having clients as "friends" on an attorney's personal and/or professional social media accounts. The consensus was that it was fine to have a client as a "friend," but communication with a client on social media regarding the case should be avoided.

2. Scheduling, Continuances and Extensions of Time

The group overwhelmingly agreed that attorneys should discuss continuances and extensions on deadlines before seeking court assistance or intervention. However, agreeing to continue a hearing or trial depends on when the court may schedule the new

date. In the First Circuit, due to lack of staffing, it is not possible to have information regarding hearing dates readily available. In the other circuits, one can easily call and find out the next available hearing and/or trial dates.

The participants discussed the remedies available when opposing counsel does not stipulate to a continuance or to extend deadlines. Possible remedies include requesting Rule 16 conferences or filing motions to continue.

3. Settlement and Alternative Dispute Resolution

The participants acknowledged that their duties are to families. The consensus was that litigation is harmful to children, and settlement is always the best option. The Family Court has encouraged and implemented alternative dispute resolution methods both inside and outside of the courtroom.

The First Circuit Court's Volunteer Settlement Master program ("VSM") is one example of both the judges' and attorneys' commitment to reach resolution without litigation. There was much discussion about the ability to expanding the program to other calendars, e.g., paternity, in the First Circuit, and to the other judicial circuits. Ways to improve the already successful VSM were also discussed including when to assign a case to the program and the length of time a case should be in the program.

The group was supportive of expanding mediation programs and considering ideas to facilitate settlement.

4. Succession Planning

Should attorneys be required to designate a successor? If there is a pending case before a judge, should the judge act? Should there be different duties for a successor as opposed to a trustee? If there is no successor, should the cost of the trustee be covered by a new bar assessment or by an increase in the bar assessment for ODC operations?

The group's discussion was vast and varied as there were members who were solo practitioners, former solo practitioners, neighbor island practitioners, partners in larger practices, members of the HSBA board of directors, and members who had personal experiences with friends and colleagues who have passed on. The group discussed the importance of having a succession plan, which may include designating a

successor now, purging unnecessary documents and files throughout one's practice, and mentoring younger attorneys for possibly taking over a practice.

Attorneys were encouraged to discard files that were not necessary as the successor attorney must go through every file and try to contact each client which may not be necessary as a case may have been closed years ago. A good practice tip is to set automatic delete dates on old files, both paper and electronic.

The neighbor island practitioners discussed the difficulty of naming someone as the number of attorneys who practice family law is small.

There was concern about any type of penalty imposed for failing to name a successor, such as suspension of one's law license. Duties of a successor were discussed and how such a role would impact an attorney's own law practice.

The consensus was that it is a best practice to develop and maintain a succession plan in the event of an untimely emergency or event that causes attorneys to be unavailable for their clients. However, the group strongly opposed any draconian penalties such as suspension. The group felt that possibly ODC should be responsible for the costs through assessments from the attorneys after first trying to recover costs from the deceased attorney's estate.

B. SPECIFIC TOPICS

1. Uniformity

Uniformity among the circuits: where, when, can or should uniformity be required throughout the judicial circuits? Should forms be standardized? Should court proceedings be standardized?

The discussion regarding uniformity among the circuits was two-fold: forms and procedures.

Regarding the issue of standardizing forms, overwhelmingly the group said yes. First Circuit seems to have the most comprehensive set of forms, and the other circuits' forms should be used, especially where these forms cover areas the First Circuit forms do not.

Judges from the other circuits acknowledged using some of the First Circuit forms where appropriate because their own circuits lacked a necessary form. Standardizing

forms would promote access to justice particularly, for pro se litigants. The non-profit legal service providers and volunteers reported it is difficult not having forms for the pro se litigants to use as the Family Court process can be difficult to explain and understand.

The consensus was to standardize forms and to look to the First Circuit to lead the way – taking its forms and revising them, if necessary, for a particular circuit. Concern was expressed about standardizing the forms to be compliant with the upcoming e-filing of Family Court documents.

Standardizing the family law practice in all circuits was also discussed. For example, in the case of a Motion for Pre-Decree Relief, the First Circuit requires the parties to be prepared for an evidentiary hearing at the initial return hearing. The other circuits treat the initial return hearing date as a hearing where no evidence or testimony is taken.

Currently, it appears that standardizing procedures is not possible because each circuit differs as to the volume of cases, the number of judges, the number of courtrooms, and the number of staff.

Improving communication among the bench, the bar, and the public in general was discussed. Several strategies may be memoranda from the court about expectations in the courtroom, a brochure for pro se litigants explaining procedures, and possibly a webpage.

The group recommended a committee be created to work on standardizing forms statewide. The group further suggested that a committee be formed to work on creating a flyer or brochure and/or webpage/video with information on “what to expect” for a return hearing, evidentiary hearing, TRO hearing, trial, and the like for dissemination to or access by pro se litigants.

2. Judicial Economy and Efficiency

Are there ways in which the Judiciary and the bar can streamline the judicial process to maximize the limited resources and time the court has? How should attorneys/the court deal with scheduling conflicts? Discovery? Settlement? Alternative Dispute Resolution (“ADR”)?

a. Scheduling Conflicts

Scheduling conflicts appeared to be an issue for those practicing in the First Circuit, and the attorneys reported that the judges on the neighbor islands have been accommodating. In the Second, Third, and Fifth Circuits, the process of securing a court date from the courts prior to filing a motion helps to avoid scheduling conflicts.

Best practices require an attorney with scheduling conflicts or overscheduling problems to contact opposing counsel beforehand and to determine if issues can be resolved or continuances can be agreed upon in advance.

The consensus was communication is key in avoiding scheduling conflicts. If a conflict is unavoidable, further communication with opposing counsel or the court should be undertaken to avoid sanctions.

b. Discovery

Often cases are scheduled before the court without the parties having either engaged in ADR or conducted proper discovery. The group believed best practices include doing informal initial discovery liberally. Practitioners should be mindful to ask for only what is needed. Cases that are more difficult or complex may require formal discovery.

The group discussed the requirement to “meet and confer” prior to filing a motion to compel. The judges reminded the bar that the attempts to confer need to be sincere and reasonable. The consensus was a meeting was required in-person or by phone, not by writing a letter.

c. HFCR 68³

In Brutsch v. Brutsch, 390 P.3d. 1260 (Haw. 2017) and Cox v. Cox, 138 Haw. 476, 382 P.3d 288 (Haw. 2016),⁴ the Hawaii Supreme Court held that HFCR Rule 68 did not apply to family court cases governed by Haw. Rev. Stat. § 580-47.⁵ Are offers of settlement still possible in light of these cases?

³ HFCR 68, Offer of Settlement, provides as follows:

At any time more than 20 days before any contested hearing held pursuant to HRS sections 571-11 to 14 (excluding law violations, criminal matters, and child protection matters) is scheduled to begin, any party may serve upon the adverse party an offer to allow a judgment to be entered to the effect specified in the offer. Such offer may be made as to all or some of the issues, such as custody and visitation. Such offer shall not be filed with the court, unless it is accepted. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, any party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the court shall treat those issues as uncontested. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible, except in a proceeding to determine costs and attorney's fees. If the judgment in its entirety finally obtained by the offeree is patently not more favorable than the offer, the offeree must pay the costs, including reasonable attorney's fees incurred after the making of the offer, unless the court shall specifically determine that such would be inequitable.

⁴ In Cox v. Cox, 138 Haw. 476, 382 P.3d 288 (Haw. 2016), the husband tendered a settlement offer to the wife, and she declined the offer. The case was tried and the parties' marital assets were divided. After an unsuccessful appeal by the wife, the husband sought post-offer attorney's fees and costs under HRCR 68. The family court granted the motion as to the post-offer trials and costs and denied the appellate fees and costs. The Intermediate Court of Appeals ("ICA") ruled that the appellate fees were recoverable under Rule 68. The Supreme Court vacated the ICA's judgment, holding that the 2006 and 2015 versions of Rule 68 did not apply to family court cases governed by Haw. Rev. Stat. § 580-47 and therefore, the husband was not entitled to appellate attorney's fees under Rule 68.

⁵ Haw. Rev. Stat. § 580-47, provides, in pertinent part, as follows:

(f) Attorney's fees and costs. The court hearing any motion for orders either revising an order for the custody, support, maintenance, and education of the children of the parties, or an order for the support and maintenance of one party by the other, or a motion for an order to enforce any such order or any order made under subsection (a) of this section, may make such orders requiring either party to pay or contribute to the payment of the attorney's fees, costs, and

The group asked whether the courts contemplate awards of attorney's fees if one party takes an unreasonable position and whether it is even feasible to make settlement offers. From the attorneys' perspective, without HFCR 68, settlement offers have diminished. There seems to be more litigation.

The consensus was there should be a committee to discuss possible revision of Haw. Rev. Stat. § 580-47 to allow for settlement offers to be contemplated and considered, otherwise attorney's fees would be imposed.

3. Access to Justice in Family Court

Should volunteers be recruited to assist pro se parties in drafting court orders? Should the Kapolei Access to Justice Room be expanded to a regular one-day session in Honolulu?

The First Circuit shared that it has started a program to expand the Kapolei Access to Justice program by having volunteer attorneys assist pro se litigants with drafting orders that result from hearings on pre- or post-decree matters. Legal Aid Society of Hawaii provides a few volunteers regularly, and there were a few private attorneys who volunteered their time to this program.

The First Circuit also shared that it would expand its Kapolei Access to Justice Room to downtown Honolulu in December 2019. The Supreme Court Library has donated space and supplies to make this happen. Volunteers were quick to donate their time at the new location.

The Second Circuit shared the success of its Volunteer Court Navigator program, and the group discussed possibly adapting a similar program for the family courts of the First and Third Circuits.

expenses of the other party relating to such motion and hearing as shall appear just and equitable after consideration of the respective merits of the parties, the relative abilities of the parties, the economic condition of each party at the time of the hearing, the burdens imposed upon either party for the benefit of the children of the parties, the concealment of or failure to disclose income or an asset, or violation of a restraining order issued under section 580-10(a) or (b), if any, by either party, and all other circumstances of the case.

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